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Supreme Court of the United States,

OCTOBER TERM, 1905.

GULF, COLORADO & SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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CLARKE & COURTS, MFG. STATIONERS, GALVESTON

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STATEMENT.

This suit was instituted by the State of Texas against the plaintiff in error March 8, 1902, in the District Court of Tarrant County, to recover a penalty upon the allegation that the Railway Company had charged a higher rate than that fixed by the Railroad Commission of the State on a car of corn shipped from Texarkana, Texas, to Goldthwaite, Texas. The sole defense was that the shipment was interstate, and therefore not subject to the rates prescribed by the Texas Commission. This

being the only question, it is unnecessary to insert the statutes of Texas creating the Railroad Commission and authorizing it to prescribe rates and fixing penalties for charging higher rates than those established by the Commission. The trial court on July 28, 1902, rendered judgment against the plaintiff in error for a penalty of $100.00. An appeal was taken to the Court of Civil Appeals of the State of Texas for the Second Supreme Judicial District, where, by a written opinion filed March 7, 1903 (Rec., 60 to 70), the judgment was affirmed. A motion for re-hearing made by plaintiff in error was overruled (Rec., 71, 76). Plaintiff in error's petition for writ of error addressed to the Supreme Court of the State was allowed on May 28, 1903. The Supreme Court of the State, by a written opinion filed February 4, 1904, affirmed the judgment of the trial court and of the Court of Civil Appeals. Plaintiff in error filed in the State Supreme Court a motion for re-hearing which, on March 21, 1904, was overruled (Rec., 114, 121), and on May 21, 1904, a writ of error from this Court to the Supreme Court of the State was allowed by the Chief Justice of the State Supreme Court (Rec., 122).

The findings of fact made by the trial court which were approved by the Court of Civil Appeals and the Supreme Court are:

I.

The Railroad Commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad or by two or more lines of railroad, whether under the same management and control or not, for the transportation of corn, between points within the State of Texas, in car load lots at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March 10, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific R. R. Company received legal notice before the rates prescribed became effective.

II.

The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific Railway to Fort Worth and from Fort Worth over the G. C. & S. F. Railway to Goldthwaite, Texas, is more than 165 miles.

III.

The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the defendant from Fort Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the State of Texas.

IV.

The Texas & Pacific Railway Company executed a bill of lading dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G., and which bill of lading purported to show that the said corn was consigned to shippers' order notify Saylor & Burnett, Goldthwaite, Texas.

V.

Said carload of corn was transported by the Texas & Pacific Railway Company to Fort Worth and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it arrived on the 17th day of January, 1902, and Saylor & Burnett, who were acting for Samuel Hardin Grain Company, tendered to the defendant's agent at Goldthwaite, $82.50 in payment of the freight charges thereon; the said agent declined to accept said amount of $82.50 in payment of said charges, and demanded $165.00 for the transportation of said carload of corn from Texarkana, Texas, to Goldthwaite, Texas.

VI.

The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded and received from Samuel Hardin Grain Company $165.00 for the transportation of said carload of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas; in so charging, collecting, demanding and receiving said $165.00 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant Company, who believed and advised that said shipment was interstate commerce, and his action in so doing was subsequently ratified by the defendant.

VII.

The Samuel Hardin Grain Company made complaint to the Railroad Commission of Texas of the action of the defendant in charging more than 12½ cents per hundred pounds for transporting the said corn, whereupon the Railroad Commission investigated such complaint and ordered this suit to be instituted in accordance with the provisions of Article 4568 of the Revised Statutes of Texas.

VIII.

On December 23, 1901, the Samuel Hardin Grain Company, at Kansas City, Mo., offered to sell Saylor & Burnett, at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel for delivery on Ry. track at Goldthwaite, and this offer was accepted for two carloads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn, but on December 24, 1901, to fill the order it contracted with the Harroun Commission Company of Kansas City for the purchase—two 66,000-pounds cars of No. 2 mixed corn at 75½ cents per bushel, to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill

the order of the Hardin Grain Company. These cars had originated in Hudson, S. D. The receiving carrier at Hudson was the Chicago, Milwaukee & St. Paul Railway Company, who issued bills of lading limiting its liability to losses occurring on its road with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to "Forrester Bros., Texarkana, Texas," and shipment made in cars of C. M. & St. P. R'y Co., care of Kansas City Southern Railway at Kansas City, Mo., with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17, 1901, was there unloaded, sacked and transferred to the Kansas City Southern Railway Co., who, on December 31, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3845 P. G. and No. 4189 F. G., that same was received of Forrester Bros. and consigned as follows: "Shipper's order, notify Harroun Commission Company, Texarkana, Texas," and reciting further that freight 14 cents per hundred pounds was prepaid, and one of these cars, to wit: car "No. 3845 P. G." is the car in controversy in this suit.

IX.

The Harroun Commission Company paid no freight on the corn from Hudson, S. D., to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

X.

The freight on the corn from Hudson to Texarkana was as follows: 18 cents per hundred pounds from Hudson to Kansas City and 14 cents from Kansas City to Texarkana, all of which was paid by the vendors of Harroun Commission Company.

The minimum interstate rate from Hudson, S. D., to Goldthwaite, Texas, was 46 cents per hundred pounds, which would have been apportioned as follows: 18 cents from Hudson to Kansas City, and 28 cents from Kansas City to Goldthwaite, Texas. The G. C. & S. F. R'y Co., the T. & P. R'y Co., and the Kansas City Southern R'y Co., together with other connecting

lines from Kansas City, Mo., to Goldthwaite, Texas, had established a joint tariff of 35 cents per hundred pounds on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them and had filed tariffs establishing such rate with the Interstate Commerce Commission, and by such steps had brought itself within the provisions of the interstate commerce law.

XI.

The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the State commission rates, and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett *at Goldthwaite at about* 1½ *cents* per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City *and had shipped from Kansas to Goldthwaite.* At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin, the manager of the *latter Company, intended that the corn to be thereby acquired should go to Saylor & Burnett, and should be shipped to Goldthwaite, from Texarkana as soon as practicable,* and on December 26, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City and be shipped out of Kansas City to Texarkana, but *at the time of making the contract he did not know from whence the corn would come.*

XIII.

On December 31, 1901, the date of shipment from Kansas City to Texarkana, Harroun Commission Company informed the Hardin Grain Company that the corn to fill the latter's order had been loaded to start to Texarkana, and requested instruction as to how the corn should be shipped from Texarkana for the guidance of F. L. Adkins, their agent at that place, who would attend to such re-shipping for the Hardin Grain Company, as per former understanding. Thereupon and in compliance with

such request blank bills of lading were made out by the Hardin Grain Company in Kansas City and furnished to the Harroun Commission Company, to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company, and F. L. Adkins, as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Texas, consigned to "Shipper's order, notify, etc." giving the numbers and initials of cars, which information had been furnished by the Harroun Commission Company, and on January 14, 1902, the re-shipment having been made as per instructions, the bills of lading duly executed by the Texas & Pacific R'y Co., were by Harroun delivered to Hardin Grain Company, who thereupon paid the Harroun Commission Company $1779.64, the purchase price previously agreed upon for the corn, and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that Company of the intended final destination and disposition of the corn.

XIV.

Neither Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but under the agreement between the two Companies (Hardin and Harroun), one F. L. Adkins, who was the agent of the Harroun Commission Company, and stationed at Texarkana, re-shipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific R'y Co. and the G. C. & S. F. R'y Co., by bill of lading reciting its receipt from Hardin Grain Company, and consigned to "Shipper's order, notify Saylor & Burnett, Goldthwaite, Texas," and was transferred under original seals and without breaking packages, to the Texas & Pacific R'y Co., after having remained in Texarkana five days; the only thing done by F. L. Adkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the T. & P. R'y, and take a bill of lading from the latter company. The corn reached Texarkana January 7, 1902, and was shipped out from Texarkana January 13, 1902; the defendant was not a party to the bill of lading executed at Texarkana.

XV.

On December 31, 1901, Hardin Grain Company mailed to Saylor & Burnett an invoice of the corn, in the form of an account stating the car numbers and initial, the amount of corn and price to be paid by Saylor & Burnett.

The federal question was properly made in the answer filed by the Railway Company in the trial court (Rec., 4), and in all subsequent proceedings in the Court of Civil Appeals and in the Supreme Court (Rec., 57, 60, 71, 76, 106, 114). The findings of fact by the trial court were attacked only on the ground that the Court erred in the eleventh finding to the effect that at the time of making the contract for the purchase of the corn, Hardin, who represented the Hardin Grain Company, did not know from whence the corn would come (Rec., 57). It is true that Hardin testified in a general way that at the time he made the agreement with the Harroun Commission Company for the purchase of the corn he did not know from whence the corn would come. The following extracts are from the deposition of Mr. Hardin, taken on written questions:

"At the time the two cars of corn were bought from the Harroun Commission Company they had no knowledge as to where the corn was going, but on December 31st they advised us that they had two cars of corn which they intended to give us on the order in question, and as their representative in Texarkana, Texas, had to have the bills of lading in hand for the shipment of this corn from Texarkana, Texas, to its destination, they asked us for our billing on the corn, which we furnished them, and they attended to having the billing executed for us from Texarkana, Texas, to Goldthwaite, Texas." (Rec., 20.)

"When we bought the corn from the Harroun Commission Company on December 24th, to fill the order for Saylor & Burnett at Goldthwaite, Texas, they were merely verbal. Two days later, however, the Harroun Commission Company con-

firmed the purchase in writing, copy of which is hereto attached. We did not give any shipping instructions to the Harroun Commission Company at the time purchase was made further than to advise them that we desired this corn to be delivered to us at Texarkana, and this was done orally." (Rec., 24, 25.)

"We bought this grain from the Harroun Commission Company on December 24, 1901, to be delivered to us at Texarkana, Texas, and on December 31st the Harroun Commission Company advised us and also rendered us an invoice as a memorandum of the car numbers, initials and the amount of corn contained in the cars, which they intended to deliver us at Texarkana, Texas, as per contract for said corn, and these invoices were furnished that we might know at as early a date as possible what corn they intended to give us to fill their contract of December 24th, and we presume that the time intervening between December 24th and December 31, 1901, was the time required by them to decide on what corn they would give us, and in getting same loaded into cars. On receipt of information as to what corn they intended to deliver to us, which was given on December 31st, we furnished the Harroun Commission Company bills of lading made out from Texarkana, Texas, to Goldthwaite, Texas, via T. & P. and G. C. & S. F. Railways, as they maintained a representative at Texarkana, who they were willing should attend to the re-billing of the grain out of Texarkana for our account and because they desired to retain possession of such bills of lading until we had made payment to them for the corn in question." (Rec., 25.)

"The bills of lading covering these shipments from Texarkana, Texas, to Goldthwaite, Texas, were made out in our office at Kansas City, and we presume were made out with rubber stamps reading Samuel Hardin Grain Company, and with another rubber stamp reading "Shipper's order, notify," as that is our usual custom of making out such bills. The bills of lading covering these two shipments were made out as soon after we had learned what corn was to be delivered to us, the car numbers and initials, etc., as was convenient for us to do so; the same were delivered to the Harroun Commission Company to be executed by their agent at Texarkana for our account." (Rec., 26.)

"From the moment I bought the corn I knew that whatever corn was delivered to me at Texarkana would be shipped from there to Goldthwaite, Texas, to fill the order of Saylor & Burnett, and I knew as soon as informed by the Harroun Commission Company that they intended to give us two certain cars of corn to fill their contract of December 24th to us, that it was ultimately going to Saylor & Burnett at Goldthwaite, Texas." (Rec., 27.)

"On January 2d we rendered Saylor & Burnett invoice on car 3845 P. & G. substantially as given in interrogatory No. 20, and marked same 'corrected invoice.' By 'corrected invoice' we simply mean that on December 31st, when we first received notice from the Harroun Commission Company that two certain cars of corn had been loaded for us to fill their sale to us of December 24th, we rendered Saylor & Burnett invoices on that date, but made an error in those invoices, which we discovered on January 2d, and then issued our corrected invoices. I presume the corn was in transit between Kansas City and Texarkana at the time the above invoice was rendered. I note in my letter of December 24th, to Saylor & Burnett, of Goldthwaite, Texas, I made the statement that we had ordered cars for the loading of this corn. This statement was not correct, as under the nature of our contract for this corn we had not and could not order cars for same." (Rec., 27.)

The letter of confirmation written by the Harroun Commission Company to Samuel Hardin Grain Company dated Kansas City, December 25th, reads:

"We confirm sale to you on 24th inst. of two 66,000-pound cars of bulk No. 2 mixed corn at 75½ cents per bushel, delivered at Texarkana, our weights and grades, shipment as quickly as we can get cars, cars to be held at our elevator for sacking." (Rec., 29.)

On December 31, 1901, Hardin Grain Company wrote to Saylor & Burnett, as follows:

"We herewith hand you invoice on your two cars of corn *which we sent forward from Kansas City to-day via Texarkana*, and will reach you in due course of transportation.

"We are mailing you our card prices to-day, and if there is anything you can use, kindly wire us on receipt of same." (Rec., 29.)

The witness, Hardin, further testified: "My recollection is that the confirmation of the trade between ourselves and the Harroun Commission Company stated the terms of our purchase covering the two cars of corn in question. That letter of confirmation from the Harroun Commission Company is attached to the original deposition and is not now in our possession, and I do not recall its exact language. If we allowed the Harroun Commission Company to change or modify their original terms of the purchase, we did so because it was our privilege, with their consent. We are in the habit of allowing confirmations to be changed, with our consent, at any time, whether written or verbal. This letter of confirmation is not in our possession, but as we recollect, at the time of this purchase verbally there was no understanding as to where the corn was to be shipped from, or as to where the cars were to be loaded; in other words, it was a matter of perfect indifference to us, so long as the corn was to be delivered to us at Texarkana at the purchase price and as quickly as possible, and at the time of purchase I did not know that the corn would be loaded and sacked at Kansas City, as the Harroun Commission Company sometimes loaded corn for us at St. Joseph, Missouri, at other times at Kansas City, and at still others; the corn was at Texarkana at the time of purchase." (Rec., 32.)

M. S. Bird, salesman for the Harroun Commission Company, testified:

"We sold the Samuel Hardin Grain Company the said two cars of corn on the 24th day of December, but did not confirm it until the 26th. I did not know to whom the cars were going. I knew that they were to go beyond Texarkana, but our sale was basis of that point." (Rec., 36.)

This witness further testified:

"The only shipping directions so far as I am aware of were those which directed the cars to Texarkana, which were given on December 26th, the date the trade closed. Those directions were merely in the form of confirmation of the sale." (Rec., 37.)

"The letter of December 26, 1901, from Harroun Commission Company to Hardin Grain Company, correctly states the facts and terms of the trade as to the two cars of corn as verbally made with the Hardin Company." (Rec., 38.)

A. L. Harroun, president of his company, testified:

"We sold Samuel Hardin Grain Company the said two cars on the 24th, that is, the sale was confirmed on the 26th day of December, 1901. (Rec., 39.)

"And our confirmation of their purchase, by letter of December 26, 1902, correctly states the terms of sale. We had an agent at Texarkana, whose name is F. L. Atkins." (Rec., 40.)

L. W. McBride, for the defendant, testified:

"That he was agent for the Texarkana & Ft. Smith Railway Co., and that his occupation in January, 1902, was the same. That P. & G. car 3845, loaded with grain was received by the Texarkana & Ft. Smith Ry., at Texarkana on Jan. 7th, and was delivered to F. L. Atkins, authorized agent of the Harroun Commission Co. He came to the office, surrendered the bill of lading, receipted us for the car and requested us to set it over on the T. & P. transfer track. This constituted a delivery to Atkins. The car was not unloaded while in our possession, as Mr. Atkins' place of business was not on our track. The car was transferred under the original seals. I do not know whether Mr. Atkins ever saw the car or not. It arrived January 7th, and was transferred to the T. & P. on the 12th." (Rec., 41.)

The General Freight Agent of the Railway Company in his testimony explained how the rate charged and collected at Goldthwaite was arrived at. (Rec., 41 to 52.) A statement thereof is not deemed pertinent to the question whether the shipment was interstate.

On cross examination the witness testified:

"Whether the through rate was granted from Hudson, South Dakota, to Texarkana or not, the shippers or owners of the corn had the privilege of taking it into their possession at Kansas City, a terminal of the Chicago & St. Paul. Its bill of lading was executed by delivery at Kansas City; that is, the owners of the corn

had the right to take it into their possession at Kansas City and could make a new shipment if they wanted to. This privilege is accorded to them by the railroads at any time. There is a milling and transit rate. You can ship stuff and stop it at a certain place with the privilege of shipping it afterwards to another place at the through rate."

Witness was asked: "Ain't that just exactly what was here, that they had the right to ship that stuff from South Dakota to Kansas City, and stop it there and sell it if they wanted to, or take it from that point to Texarkana, and then only pay the 14 cents from Kansas City to Texarkana?" And answered: "I can only presume that they did. I presume that they did; 18 cents and 14 cents appear to be the rates. There was no necessity for any such privilege on this shipment; it was simply the two rates. They could have shipped it originally from South Dakota to Kansas City for 18 cents under a bill of lading showing Kansas City to be the destination, and then could have reshipped it to Texarkana for 14 cents." (Rec., 94, 95.)

It also appeared from the testimony of the witness that plaintiff in error's division of the through rate from Kansas City under agreement with other lines in the route was much larger than its division of the Texas Commission rate applying between Texarkana and Goldthwaite, Goldthwaite being a point situated only on the railroad of the plaintiff in error and it being the practice of interstate lines to allow the company to whose local territory the shipment was to move a very liberal division of the through rate. (Rec., 93.)

ASSIGNMENTS OF ERROR.

1.

The Supreme Court of the State of Texas erred in finding that there was no error in the conclusion of fact of the trial Court, that: "On December 26, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which the Harroun Commission Company expected to fill

his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come."

2.

The Supreme Court of the State of Texas erred in holding that there was no error in the finding of the Court of Civil Appeals that this plaintiff in error has insisted that the transportation of the corn in controversy was but a part of a more extended and continuous shipment from South Dakota to Goldthwaite, and therefore an interstate shipment, because such finding is directly contrary to appellant's contention in this case, its contention being that the testimony does not warrant a finding that this was a shipment from South Dakota to Texarkana, but to the contrary that the testimony clearly shows, and there is no finding by the trial court to the contrary, that the shipment was from South Dakota to Kansas City with the right to reship to Texarkana, if desired, but that the journey of the corn was to all practical, legal intents and purposes at an end when it got to Kansas City; and there is absolutely no testimony in this record to support a finding and claim that this was a continuous shipment from South Dakota to Texarkana, but to the contrary that the record clearly shows that the billing from South Dakota to Texarkana was a mere matter of convenience and that it did not fix the destination of the shipment at all, and that if it had not been for Saylor & Burnett buying the corn from Hardin, there is nothing that would suggest that the corn would ever have gone to Texarkana; it might just as well have gone to New Zealand or the North Pole, and the Court's opinion is not a correct reflection of the record or the contention of the plaintiff in error.

3.

The Supreme Court of the State of Texas erred in overruling the third assignment of error of plaintiff in error in that court, complaining of the holding of the Court of Civil Appeals, that there was no finding that required the conclusion that at the time of the original shipment in South Dakota, any other place than Texarkana was intended as final destination, because there is no

finding that forbids any such conclusion, and the undisputed evidence shows that naming Texarkana as the destination of the shipment was purely a matter of convenience and a makeshift, and that the real destination of the shipment when it left South Dakota was Kansas City, and that whether it ever went beyond Kansas City or not, depended on what disposition was made of it at Kansas City, and the statement by the court of Civil Appeals in its opinion that Texarkana was intended as its final destination is without support in the record; and the Court's opinion predicated on this finding, if any, results in the failure of the Court to determine the material question that both the appellant and appellee asked the Court to decide, to wit: whether if such shipment had originated at Kansas City and had belonged to the Hardin Grain Co. at the time it was sold to the Goldthwaite parties, and was billed to Texarkana and rebilled from there, would this have changed its character as interstate commerce?

4.

The Supreme Court of the State of Texas erred in overruling fourth assignment of error of plaintiff in error in that court, complaining of the finding of the Court of Civil Appeals that the corn was cleaned and sacked at Kansas City and that it was only stopped at Kansas City for that purpose and as soon as that was done, it continued on its journey to Texarkana consigned to the order of the original shipper, because there is no evidence in the record one way or the other as to why the grain was stopped at Kansas City and no evidence that the only purpose for so stopping it there was to clean it and sack it, but to the contrary the evidence indicates clearly that it was usual to stop grain there to determine its final destination.

5.

The Supreme Court of the State of Texas erred in failing to sustain the fifth assignment of error of the plaintiff in error in that court, complaining of the finding of the Court of Civil Appeals that these transactions, to wit: the transaction between Harroun and Hardin and the simulated billing to Texarkana for the purpose of getting the benefit of the State rate, are not impugned

by the finding of the trial court as having been done in bad faith for the purpose of and to thereby avoid the effect of the Interstate Commerce law; because the trial court finds that the reason why the Hardin Grain Company contracted for the grain to be delivered to them at Texarkana was to get the advantage of a cheaper rate.

6.

The Supreme Court of the State of Texas erred in overruling the second assignment of error of plaintiff in error, in the Court of Civil Appeals, reurged in the Supreme Court of the State of Texas, said assignment being as follows:

"The Court erred in his conclusions of law in this case in finding that the shipment in controversy from Texarkana, to Goldthwaite, Texas, was not an interstate shipment, but originated and terminated in the State of Texas; and erred in that behalf in rendering a judgment against this defendant for a penalty, because the undisputed evidence and the Court's conclusions of fact show that the shipment in question was an interstate shipment, and not subject to rates and the regulation of the State Commission, and therefore there should be no recovery of penalty in this case."

7.

The Supreme Court of the State of Texas erred in overruling third assignment of error of plaintiff in error, in the Court of Civil Appeals, reurged in the Supreme Court of the State of Texas, said assignment being as follows:

"The Court erred in his conclusions of law in finding that the shipment in controversy was a State shipment, and erred in rendering judgment for penalty against this defendant, because the undisputed evidence shows that the corn in question was bought by the Hardin Grain Company in Kansas City, Mo., from merchants there, with the then fixed purpose and intention that it should be transported and delivered to Goldthwaite, Texas, to Saylor & Burnett, without any breakage of bulk or transfer of any kind, and the undisputed evidence and the findings of the Court show that when the grain was bought in Kansas City, its ultimate destination was fixed at Goldthwaite, Texas, and when it left Kansas City, it began a journey to a destination fixed at Goldth-

waite, and the shipment was therefore interstate commerce, and not subject to the rates, rules and regulations or jurisdiction of the State Commission."

8.

The Supreme Court of the State of Texas erred in overruling the fourth assignment of error of plaintiff in error, in the Court of Civil Appeals, reurged in the said Supreme Court of the State of Texas, said assignment being as follows:

"The Court erred in finding in its conclusions of law that the shipment in controversy was not an interstate shipment, and erred in rendering judgment against this defendant for penalty, because the undisputed evidence shows, and the Court so found, that the reason why the Hardin Grain Company contracted for the corn to be delivered to them at Texarkana, was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than if they had bought the grain delivered to them at Kansas City, and had shipped from Kansas City to Goldthwaite, and that the Hardin Grain Company kept themselves informed of Interstate Commission freight rates and of State Commission rates, and the practically undisputed evidence shows that the only purpose of billing to Texarkana and rebilling from that point was to juggle with the rates and to avoid the interstate rate and to endeavor, by makeshift and pretense, to destroy the character of the shipment and make it appear to be a State shipment, when it was an interstate shipment, all of which is expressly forbidden by the provisions of the Interstate Commerce law, and the attempted subterfuge was of no effect and the shipment was and continued to be interstate and not State traffic, and not subject to the rules, regulations and rates of the State Commission."

9.

The Supreme Court of the State of Texas erred in overruling the fifth assignment of error of plaintiff in error, in the Court of Civil Appeals, reurged in said Supreme Court of the State of Texas, said assignment being as follows:

"The Court erred in finding the shipment in question to be an interstate or domestic shipment, and subject to the Texas Com-

mission rates and erred in rendering judgment for a penalty against the defendant, because the undisputed evidence shows that the shipment in controversy was a shipment from Kansas City to Goldthwaite, and the undisputed evidence shows, and the Court so found, that the defendant had with its connecting lines handling the shipment, established and published, and under the provisions of the Interstate Commerce law, filed with the Interstate Commerce Commission, rates applying on such shipment and to which under the law, the shipment was subject, and not subject to the State Commission rate."

10.

The Supreme Court of the State of Texas erred in holding that under the facts in this case and under the law, the shipment in question from Texarkana, Texas, to Goldthwaite, Texas, was a State shipment, the practically undisputed evidence being that except for the purchase by the Goldthwaite merchants, the shipment would not have started at the time it did to Texarkana, and the probabilities were that it never would have gone to Texarkana, that in truth and in fact it was in Kansas City awaiting sale, and that when it was sacked and loaded into the cars at Kansas City, and a new journey was begun with an ultimate destination of Goldthwaite, and that the real or pretended transfer of title at Texarkana was for the sole purpose of disguising the character of the shipment, and enabling the parties at interest to get the benefit of a combination of an interstate rate to Texarkana and a State rate from Texarkana to Goldthwaite, and to deprive the carriers, and this plaintiff in error in particular, of its proper proportion of the through rate, the decision of said Supreme Court therefore being in effect to deprive this plaintiff in error of its right to have its revenue from interstate commerce regulated and determined by the Constitution of the United States and the laws of Congress passed in pursuance thereof, and by the rates and tariffs established by the railroads in pursuance of the laws of Congress, and said Supreme Court by its decision in this case deprives this plaintiff in error of rights, privileges and immunities claimed by it under the Constitution of the United States and the statutes thereof; and the decision of said court is against the title, rights and privileges and immunities of this

plaintiff in error set up in this case; and the decision of said court is against the authority and right by this defendant exercised to receive and collect its interstate revenue from interstate traffic under the Constitution of the United States and the laws thereof; and the decision of said court is in favor of the validity of statutes and authorities and rights exercised and set up under the laws of the State of Texas, which, construed as by said court in its opinion, are repugnant to the Constitution and laws of the United States.

11.

The Supreme Court of the State of Texas erred in basing its entire opinion and judgment on the erroneous assumption that the case presented was one of a *bona fide* shipment from South Dakota to Texarkana as ultimate and certain destination, that in transit was sold to parties who reshipped it to Goldthwaite, when the facts are, as shown by the record, that it was originally a shipment only to Kansas City, at which point the obligation of the first carrier ended, and having no other indication of being intended to go to Texarkana except a way-bill notation which gave the privilege of shipping to Texarkana at a reduced rate if the owner afterwards thought desirable, a contingency which might or might not have arisen, the original shipment being in effect completed at Kansas City and not at Texarkana.

12.

The Supreme Court of the State of Texas erred in affirming the judgment of the trial court and of the Court of Civil Appeals because it appears from the findings of facts made by the trial court and approved by the Court of Civil Appeals and by said Supreme Court that before the car of grain arrived at Texarkana, Texas, and while it was in another State or Territory of the United States, and after the car of grain had been sold by the Harroun Commission Company to the Hardin Grain Company, it was the intention and purpose both of the Harroun Commission Company and of the Hardin Grain Company that the particular car of corn should be shipped to Goldthwaite, Texas, and should only stop at Texarkana, Texas, for the purpose of being transferred from one railroad to another for further transportation to Goldthwaite,

Texas, and it thus appearing that it was the intention of the parties who controlled the shipment before the car of corn arrived at Texarkana, Texas, and while it was in another State or Territory that the same should be stopped at Texarkana, Texas, only for the purpose of said transfer, such findings of the Court showed that the shipment was interstate commerce until the arrival thereof at Goldthwaite, Texas, and hence that the rates which plaintiff in error could charge thereon were controlled only by the Constitution and laws of the United States, and not by the laws of the State of Texas, or by the rates and regulations of its Railroad Commission; and in this view of the case it is immaterial whether the point of origin of the shipment was Kansas City, Mo., or Hudson, South Dakota, and in thus affirming such judgment, said Supreme Court deprived plaintiff in error of a right claimed and existing under the Constitution and laws of the United States which applied to the facts of this case, and the laws of the State of Texas and the rules, regulations and rates of its Railroad Commission, as so applied by said Supreme Court to the facts of this case, were and are contrary to the Constitution and laws of the United States.

13.

The Supreme Court of the State of Texas erred in affirming the judgment of the trial court and of the Court of Civil Appeals, because on the facts as found by the trial court and approved by the Court of Civil Appeals and by this Court, it appeared that before the shipment in question arrived at Texarkana, Texas, and while the shipment in question was in another State or Territory that the parties controlling the shipment had fixed its destination at Goldthwaite, Texas, and that its stoppage at Texarkana, Texas, was for the purpose of transfer from one railroad to another for further transportation to Goldthwaite, Texas, and the same was therefore commerce among the States and the charges which plaintiff in error was entitled to make on such shipment were subject only to the Constitution and laws of the United States, and not to the Constitution and laws of the State of Texas, or to the rates, rules and regulations of its Railroad Commission, and hence the effect of the decision of said Supreme Court was and is to deny to the plaintiff in error a right claimed under the

Constitution and laws of the United States, and to give effect to the laws of the State of Texas, and the rules, regulations and rates of its Railroad Commission, which as applied to the facts of this case are contrary to the Constitution and laws of the United States.

ARGUMENT.

Under a misconception that the Railway Company contended that the sale by the Harroun Company to the Hardin Company was only completed by the letter of confirmation dated December 26, 1901, the Supreme Court of Texas at some length discussed the meaning of the word "confirm" (Rec., 110, 111). Our position which is manifest from the petition to the Supreme Court for the writ of error (Rec., 77, 78) was, that while the sale was made on December 24th, the terms thereof were stated in the letter of confirmation of December 26th. In short, that the terms of a trade made orally on December 24th were by the parties reduced to writing on December 26th. In any event, the Hardin Company was notified on December 26th that the corn to fill their contract of purchase was in Kansas City and would be shipped from that place, and thereafter and long before the cars reached the Texas line, it was arranged between the Harroun Company and the Hardin Company that immediately on arrival of the corn at Texarkana, it was to be reshipped to Goldthwaite, Texas. In short, that the Hardin Company accepted the two cars of corn to be shipped from Kansas City and when the same were shipped, made an arrangement with the Harroun Company for the immediate reshipment of the corn from Texarkana to Goldthwaite. The Supreme Court state in their opinion that the Harroun Commission Company were not agents of the Hardin Grain Company. The undisputed evidence shows that the Harroun Commission Company were the agents of the Hardin Grain Company, at least for the purpose of having the corn shipped on from Texarkana to Goldthwaite.

Transportation of freight from a point in one State to a point in another is of itself interstate commerce without reference to any question of intended sale of the freight. Such a shipment does not become interstate commerce when it reaches the State line, but continues interstate commerce until delivery at the final place of destination in the state. Rhodes vs. Iowa, 170 U. S., 412. The intention of the parties who control the shipment determines the place of final destination in the State. The mere fact that a sale is made of the freight while in transit to the place of final destination does not change its character from interstate to State commerce.

The late case of Kelley vs. Rhodes, 188 U. S., 1, involved the question whether a flock of sheep while being driven across the State of Wyoming was subject to taxation by that State. The sheep were only driven at the rate of nine miles a day and spread out for grazing. There was no written evidence of any character tending to show the destination of the sheep, but only the oral statement of the party in charge thereof made while they were in Wyoming that they were to be driven across the State. Mr. Justice Brown who delivered the opinion said:

"The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this Court which hold that property *actually in transit* is exempt from local taxation, although if it be stored for *an indefinite time* during such transit, at least for other than natural causes or *lack of facilities for immediate transportation*, it may be lawfully assessed by the local authorities. State, Detmold, Prosecutor, vs. Engle, 34 N. J. L., 425; Standard Oil Co. vs. Batchelot, 89 Ind., 1; Burlington Lumber Co. vs. Willetts, 118 Ill., 559, 9 N. E., 254."

"The substance of these cases is that, while the property is *at rest* for *an indefinite time* awaiting transportation, or awaiting a sale at its place of destination, or at any intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce, and is exempt from local assessment."

"The question turns upon the purpose for which the sheep were driven into the State. If for the purpose of being grazed, they are expressly within the first section of the act. But if for the purpose of being driven through the state to a market, they would be exempt as a matter of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit."

"Bearing in mind that the weight of all the previous cases in this Court has been laid upon the fact *of an indefinite delay*, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination the facts of this case fail completely to bring it within those authorities. The fact that the sheep may not have lost flesh, or may even have gained flesh, during their transit through the State, is impertinent, unless the primary purpose of their being driven there was for grazing."

In U. S. vs. Freight Association, 166 U. S., it was stated that the railroad companies are instruments of commerce and their business is commerce itsel and the Court quoted with apparent approval the report to the Senate by Senator Hoar, "that transportation is as much trade and commerce among the several States as the sale of goods in one State to be delivered to another."

See also McCall vs. California, 136 U. S., 108.
Norfolk & Western R'y Co. vs. Penn., 136 U. S., 114.
Wabash Railway vs. Ills., 118 U. S., 570, 573, 574.

In Hanley vs. Kansas City Southern R'y Co., 187 U. S., 617, the Court decided that the Railroad Commission of Arkansas could not fix rates for the continuous transportation of freight between two points in Arkansas but passing in route through a part of the Indian Territory. Mr. Justice Holmes who rendered the opinion said:

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

"The transportation of these goods certainly went outside of Arkansas, and we are of the opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State, and should try to regulate such traffic, what would stop it?" * * *

"But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S., 192, 36 L. Ed., 672; 4 Inters. Com. Rep., 87, 12 Sup. Ct. Rep., 806, and we are of opinion that they carry their conclusions too far. That was the case of a tax, and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S., 204; 36 L. Ed., 676; 4 Inters. Com. Rep., 91; 12 Sup. Ct. Rep., 809. And although it was intimated that, for the purposes before the Court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes."

The remarks last quoted are pertinent to the contention hereinafter stated, that the question whether property is interstate commerce is not identical with the question whether the State may tax the property. The position that transportation between States, regardless of any question of sale, is commerce, was directly established by the ruling of the Court in Champion vs. Ames, 188 U. S., 321, that Congress, under the Commerce clause, had power to prohibit an express company from carrying lottery tickets from one State to another. Mr. Justice Harlan who rendered the opinion said:

"Undoubtedly the carrying from one State to another by indipendent carriers of things or commodities that are ordinarily subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce."

"In Covington & C. Bridge Co. vs. Kentucky, 154 U. S. 204, 218, 38 L. ed. 962, 968; 4 Inters. Com. Rep. 649, 656; 14 Sup. Ct. Rep. 1087, 1092, the question was as to the validity, under the commerce clause of the Constitution, of an act of the Kentucky Legislature relating to tolls to be charged or received for

passing over the bridge of the Covington & Cincinnati Bridge Company, a corporation of both Kentucky and Ohio, erected between Covington and Cincinnati. A State enactment prescribing a rate of toll on the bridge was held to be unconstitutional, as an unauthorized regulation of interstate commerce. The Court, reaffirming the principles announced in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196, 29 L. ed. 158; 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; and in Wabash, St. L. & P. R. R. Co. vs. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, said, among other things:

"Commerce was defined in Gibbons vs. Odden, 9 Wheaton, 1, to be 'Intercourse, and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company itself is not a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across the river.'

"At the present term of the Court we said that 'transportation for others, as an independent business, is commerce irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.' Hanley vs. Kansas City Southern R. R. Co., 187 U. S. 617, ante, p. 214, 23 Sup. Ct. Rep. 214."

The dissenting opinion of the Chief Justice concurred in by Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham did not question the propositions which we have quoted from the opinion of the Court, but proceeded on the theory that lottery tickets were not articles of commerce, and relied on prior decisions of the Court to the effect that insurance policies and negotiable instruments were not instruments of interstate commerce, and that the power to regulate commerce did not include the power to prohibit it. It will not be contended that corn is not an article of commerce. The foregoing authorities seem to establish beyond question, independently

of any intention of sale or of change of ownership, that the transportation of freight on a continuous journey from a point in one State to a final destination in another State is interstate commerce until delivered at such final destination, and that mere temporary interruption in the transit will not change the nature of the shipment, and upon like reasoning, we submit that the mere change of ownership while the freight is en route will not affect the nature of the shipment. Applying these principles to the facts of this case, there is no escape from the conclusion that the Hardin Grain Company and the Harroun Commission Company, who either severally or jointly controlled the car of corn, had finally determined long before this car arrived at the State line of Texas, that its final destination was Goldthwaite, Texas. On the very day the car left Kansas City, the Harroun Commission Company called on the Hardin Company for shipping directions beyond Texarkana, and shortly thereafter, the actual moment not appearing from the evidence, the Hardin Company made out bills of lading from Texarkana to Goldthwaite and delivered same to the Harroun Company to be sent by the latter to their agent at Texarkana for the purpose of having such bills of lading executed by the Texas & Pacific Railway Company as soon as the shipment arrived at Texarkana, all of which occurred several days before the grain reached the border of Texas.

On December 31st, the day the corn was shipped from Kansas City, the Hardin Company wrote Saylor & Burnett, at Goldthwaite:

"We herewith hand you invoice on your two cars of corn *which we sent forward from Kansas City to-day via Texarkana*, and will reach you in due course of transportation."

This was an explicit declaration by the Hardin Company to Saylor & Burnett that the Hardin Company in fact controlled

the corn and had had the same shipped from Kansas City and determined the final destination of the corn to be Goldthwaite, as clearly as it was possible for human language to make; that figuratively speaking, the corn in reaching Goldthwaite was to go through the Harroun Commission Company did not alter the fact that Goldthwaite was determined upon before the car left Kansas City as the rightful and final destination thereof. No actual delivery to the consignee occurred at Texarkana, but the car of corn was there delivered to the Texas & Pacific Railway Company with the same seals that had been placed on the car at Kansas City. The agent of the Harroun Company at Texarkana merely surrendered the Kansas City Southern bill of lading, ordered the car transferred to the track of the Texas & Pacific, and had the bill of lading that had been prepared by the Hardin Company in Kansas City executed by the Texas & Pacific Railway Company. From the findings of the trial court as well as the evidence, it is difficult to resist the conclusion that but for the making of an apparent break in the transit at Texarkana in order to attempt to secure the application of the Texas Commission rate between Texarkana and Goldthwaite, that no exchange of bills of lading would have been made at Texarkana, but that the original bill of lading issued at Kansas City would have called for Goldthwaite as the destination and would have been endorsed by the Harroun Commission Company and delivered to the Hardin Company upon payment by the latter for the grain. Can railroad companies defeat the operation of the commerce clause of the federal Constitution and of the laws of Congress in pursuance thereof by mere forms? Could the Kansas City Southern R'y Co. have said to the Harroun Company: "We do not care to do business under the Constitution and laws of the United States! We will therefore only issue you a bill of lading and name a rate from Kansas City to the Missouri line, where you can arrange with an agent to re-ship, and from which point we will name you a rate and

issue bill of lading from the Kansas line to the Indian Territory line, and in turn the same thing will be done from the Indian Territory line to the Arkansas line, and in turn from the Arkansas line to the Texas line, where in turn the Texas & Pacific R'y Co. will go through the same performance from the Texas line to Fort Worth, and then the G. C. & S. F. R'y Co. will go through the same performance from Fort Worth to Goldthwaite?" It being the intention of the parties that the shipment should go from Kansas City to Goldthwaite, it is manifest that this Court would hold the same to be an interstate shipment from Kansas City to Goldthwaite, although the railroad companies, for the purpose of attempting to deprive it of the character of interstate commerce might have adopted the means above suggested. If railroad companies by manipulation or form may not make that a State or territory shipment which otherwise would be an interstate commerce transaction, for the same reason it necessarily follows that those who determine the destination of the freight cannot deprive it of its quality of interstate commerce by the form which they may elect to give to the transaction.

Section 7 of the Interstate Commerce Act reads:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment *to the place of destination*; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act."

This section, while precautionary, was evidently not necessary, for in its absence the carriers could not have defeated the right of Congress to regulate interstate commerce by dodges of any character. We repeat, if the carrier may not, that the shipper may not by simulation change the fact, and that the fact which determines the question of interstate commerce is the origin and destination of the shipment. Assuming, however, in this particular case, that the transaction was *bona fide*, yet it remains that long before the shipment reached the boundary of Texas, its destination was fixed, by those who controlled it, at Goldthwaite, Texas, and that what occurred at Texarkana, Texas, was for the purpose of evading the lawfully established interstate rate or merely to subserve the convenience of the parties to the transaction. It may be appropriate to refer your Honors to additional authorities supporting the contention that the origin and destination of freight controls, and that the fact that one or more of the carriers in the route transport wholly within the State of destination, is not material.

In the Daniel Ball, 10 Wallace, 557, it appeared that the Steamer Daniel Ball was running on an inland river between Grand Rapids and Grand Haven, in the State of Michigan. While it does not clearly appear from the report, it is to be inferred that there were temporary stoppages in transit of the goods, as necessarily if the goods arrived at one of the termini when the steamer was at the other or at some intermediate point, they would have to wait at such termini for the arrival of the steamer. We quote from the opinion of the Court:

"Two questions are presented in this case for our determination: First, whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States, within the meaning of the Acts of Congress; and second, whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise

transported by her is destined to places in other States or comes from places without the State, *she not running in connection with or in continuation of any line of steamers or other vessels or any railway line leading to or from another State.*

"But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed even if it be conceded that Grand river is a navigable water of the United States; and this brings us to the consideration of the second question presented.

"In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State and she did not run in connection with or in continuation of any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, *or goods brought from without the limits of Michigan and destined to places within the State*, she was engaged in commerce between the States, and however limited that commerce may have been she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

It being stated in the opinion of the Court which we have quoted that "she did not run in connection with or in continuance of any line of vessels or railway company leading to other States," it is fairly to be inferred that the Daniel Ball

transported shipments in question under purely local bills of lading or receipts issued only by her and under separate charges of freight rates fixed by her in which no other party had any concern. Yet because she was transporting freight that came from a point beyond the State of Michigan to a point within the State, with an ultimate destination at another point in the State, and although the service she performed was wholly within the State, the Court held that she was engaged in interstate commerce.

In Coe vs. Errol, 116 U. S., 517, the Court held that a mere intention to ship property out of the State in future would not make such property the subject of interstate commerce, but in the opinion our position in this case is clearly recognized:

"This question does not present the predicament of goods in course of transportation through a State, although detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of the State of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution.

"And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination."

In Cutting vs. Florida Railway & Navigation Co., 46 Fed., 641, for the purpose of attempting to secure the application of the Florida rate on a shipment of oranges for that part of the journey within the State of Florida, the shipper consigned the oranges to an agent at a point on the State line where they were reshipped to

a point beyond the State. Judge Pardee held, as it was the intention from the beginning that the shipment would go beyond the State, that the Florida rates were not applicable thereto between the point of origin and the place on the State line.

Navigation Company vs. Insurance Company, 89 Texas, 1. There the cotton was shipped from Houston to Galveston under a local bill of lading. It was to be transferred at Galveston to the Mallory Steamship Line; it did not appear that any contract had been made with Mallory Line for further shipment from Galveston nor was there any freight rate made; the Navigation Company only contracted for and collected its own charge to Galveston. Under the bill of lading the cotton was to have been delivered at Galveston to the order of shippers, so that it remained completely under their control and they could have sold it at Galveston, or made any other disposition of it they saw fit. Under these circumstances, because of the fact that when the cotton left Houston it was the intention of the owners to ship the same beyond the State, the Court held that it was not State but interstate or foreign commerce.

The Court said: "No distinct and certain definition of interstate commerce has yet been fixed by the decisions of the courts, and perhaps none can be given which will apply to all cases. But the law as applicable to this case, deducible from the decisions of the courts, may be stated thus: When a commodity has been delivered to a common carrier, to be transported on a continuous voyage or trip to a point beyond the limits of the State where delivered, the character of interstate or foreign commerce attached thereto. (Coe vs. Errol, 116 U. S., 517; The Daniel Ball, 10 Wallace, 557; ex parte Koehler, 30 Fed. Rep., 86; in re Greene, 52 Fed. Rep., 113; R'y Co. vs. Sherwood, 84 Texas, 125)."

"The questions to be determined are: Did the cotton in question when delivered to the Navigation Company start on its journey to a point outside of the State of Texas? Was its destination at that time fixed and determined upon, and was the carriage from Houston to Galveston a part of the voyage which was to be continuous? The facts of this case show that the owners of

the cotton lived in Liverpool, and the cotton itself was, by their agents, put in transportation by delivery to the Navigation Company to be carried by it to the City of Galveston, and there delivered to the Mallory Line, by which it was to be transported to New York, and thence by connecting line of steamers to the City of Liverpool. The bill of lading upon its face showed that the Navigation Company was to deliver the cotton to the Mallory Line at Galveston, at which time the liability of the Navigation Company should cease and that of the Mallory Line should attach. There can be no doubt that the destination of the cotton at the time of the delivery to the Navigation Company was fixed and determined, and the point at which it was destined for final delivery was beyond the limits of this State. It is equally clear from the bill of lading and other testimony that a continuous voyage was contemplated, and the trip between Houston and Galveston was simply a part of that voyage. Upon this state of facts the cotton would undoubtedly come within the rule laid down in the cases cited above, and would be classed as interstate commerce.

"But the evidence likewise shows that the Houston Direct Navigation Company gave a bill of lading to Galveston only and not a through bill to cover the entire route, and the charges for freight to Galveston and wharfage at that place were paid at the time that the cotton was delivered. Do these facts change the rule of law applicable to the case and constitute this a local shipment, as distinguished from interstate or foreign commerce?

"It has been generally held that where a carrier in one State received a commodity for shipment by continuous trip over its own line and connecting lines, giving a through bill of lading to the point of destination, with the provision that its own liability shall cease upon delivery to its connecting line, at a point within the State where it was received, such transportation is to be considered as interstate commerce, and the carrier is but one of the several agencies employed. Railway vs. Sherwood, 84 Texas, 135. The fact that the bill of lading given by the Direct Navigation Company was only to Galveston establishes simply that the liability of the company terminated at that point, and has the same effect, and no more, as if a through bill of lading had been

given by the receiving carrier, with the stipulation that its liability should terminate when delivered to the connecting carrier. The effect of such bill of lading as last named would be to make it, although a through bill upon its face, in effect a separate bill, so far as the liability is concerned of each carrier engaged in the transportation.

"We do not understand that it is necessary that all of the carriers engaged in an interstate or foreign shipment shall be parties to the contract of shipment for the entire route. In fact, as we understand the decisions, the character of the commerce is not affected by the terms of the contract of the carrier as it relates to liability for the freight, but only in so far as it shows that it is or is not a part of the continuous carriage from the beginning point to the point of destination. (The Daniel Ball cited above; Harmon vs. Chicago, 35 Am. & Eng. Corp. Cases, 654; Foster vs. Davenport, 22 How., 244.) The last two cases cited involved the question as to whether or not tugboats, engaged in towing vessels which were themselves engaged in interstate commerce, were to be considered as likewise engaged in such commerce. In each case it was held that such tugboats, although operating locally and within the limits of a State were to be considered as engaged in interstate commerce and not subject to the laws of the State. The tugboats were in no sense parties to the contracts for transportation, but were simply agencies employed therein."

It is apparent from the facts of that case and the opinion that it was decided purely upon the ground that when the cotton left Houston it was the intention of those who controlled it that it was to go beyond Galveston to a foreign port and that the notation of the transfer to the Mallory Line was merely referred to as one of the circumstances evidencing such intention.

In State vs G. C. & S. F. R'y Co., 44 S. W. R., 542 (Texas Civil Appeals, 3d District) it appeared that Long & Co. had demanded of the railway company cars at San Angelo, Texas, for the transportation of sheep to Ft. Worth, Texas, when they were notified by the railway company that it would handle the shipment ment of its interstate rate was made. Upon arrival at Ft. Worth

destined to Ft. Worth, Texas, at the rate established by the Railroad Commission provided that Ft. Worth was the final destination, but if on arrival at Ft. Worth it was found that the shipment was intended for a point beyond the State, that the railway company would not surrender the sheep at Ft. Worth unless pay- the defendant did collect its interstate rate or proportion thereof which was higher than the commission rate and it was thereupon sued by the State for a penalty. Long testified that it was his purpose to sell the sheep at Ft. Worth and only to ship beyond Ft. Worth in the event of a failure to sell there. The trial court however, found from various circumstances, including the fact that Long knew that there was no market at Ft. Worth for such a number of sheep, that he had no *bona fide* intention to sell the sheep at Ft. Worth but that the same were intended from the beginning for shipment out of the State and upon this finding the Court of Civil Appeals, relying on the Daniel Ball, 10 Wallace, 557, ex parte Koehler, 30 Fed., 867; Cutting vs. Navigation Co., 46 Fed., 641, and Houston Direct Navigation Company vs. Insurance Company, 89 Texas, 1, decided that the shipment was interstate and not subject to the Texas Commission rate for the part of the journey between San Angelo, Texas, and Ft. Worth, Texas. A writ of error was denied by the Supreme Court of the State who thereby adopted the decision of the Court of Civil Appeals. In the conclusion of their opinion, the Court of Civil Appeals said:

"We find it unnecessary to decide whether or not such a shipment would be subject to the tariff rates prescribed by the Interstate Commerce Commission. Being interstate commerce, it was not subject to State regulation, and that is sufficient to defeat the State's action to recover a penalty for a violation of the State statute. In view of the trial court's conclusions of fact, its decision on the law of the case was correct, and the judgment will be affirmed."

In State vs. Southern Kansas Railway Company, 49 S. W. R., 252 (Texas Civil Appeals, 3d District) which was also a suit by the State for a penalty for charging a rate higher than the commission rate, the trial court rendered judgment for the railway company on the following findings:

"(1) I find that on September 13, 1895, Stump & Weaver, partners, were engaged in mercantile business at Miami, Texas, and John Haggart was engaged in like business at Panhandle, Texas, 50 miles distant from Miami, and that both parties handled coal at retail. (2) That, on said date, Stump & Weaver entered into a contract with John Haggart to purchase coal from him, f. o. b. cars of the Southern Kansas Railway Company of Texas, at a fixed price. (3) That soon after said contract was entered into, about September 21, 1895, Stump & Weaver ordered one car of coal from John Haggart, to be delivered f. o. b. cars of Southern Kansas Railway Company of Texas at Panhandle, Texas, billed to Stump & Weaver at Miami, Texas. (4) That, after said car of coal was ordered by Stump & Weaver of said Haggart, he purchased the same from parties in the State of Colorado, and had it shipped, consigned to John Haggart, at Panhandle, Texas, and upon its arrival at Panhandle it was transferred from the car in which it was shipped to Panhandle to the car of the defendant road, and billed to Stump & Weaver at Miami, Texas, the freight to Panhandle being paid by Haggart; that this was done by all parties, so that they might receive the benefit of the rate of freight from Panhandle, Texas, to Miami, Texas, as established by the Texas Railroad Commission, which was less than the through rate. (5) That, when Haggart purchased the coal in the State of Colorado, he intended it to be shipped to Stump & Weaver, at Miami, Texas. (6) That Haggart did not have the coal on hand when contract with Stump & Weaver was made, and when coal was ordered by them, and it was contemplated by both Haggart and Stump & Weaver that Haggart would purchase the coal in another State, and ship the same to Miami, billing it first to Haggart at Panhandle, and there reloaded and delivered on board defendant's cars, billed to Stump & Weaver, at Miami. (7) That defendant's agents at Miami demanded and received from Stump & Weaver, for the

shipment of said coal from Panhandle, Texas, to Miami, Texas, an amount exceeding the rate for shipment of such freight, as established by the Railroad Commission of Texas, and then in force between such points."

The Court of Civil Appeals affirmed the judgment in this language:

"We are unable to distinguish this case from the principle underlying the decision of this Court in State vs. Railway Co., 44 S. W. R., 542, which was approved by our Supreme Court."

The State, although the Supreme Court had jurisdiction, did not apply to that court for a writ of error.

M. K. & T. R'y Co. vs. Fielder, 46 S. W. R., 633 (Texas Supreme Court), was thus stated:

"The case made by the pleadings and evidence is that the plaintiff and one Arnoldi were competitors in the business of selling coal in the city of Sherman; that they received their supplies from the Indian Territory; that there was a spur track from the depot of the Company to the coal bins of each of them; and that, while the defendant carried Arnoldi's coal over the spur track to his bin, it refused to extend the same accommodation to the plaintiff."

The Court held in effect that the coal remained interstate commerce until final delivery to the consignee and that the State statutes did not apply to the refusal of the railway to switch the coal on the spur track in Sherman. The Court said:

"On the contrary, it seems clear to us that it was not the purpose of the Legislature to supplement in any particular the legislation of Congress by adding something thereto in order to supply its deficiencies, but that it was to supply legislation which Congress had no power to make, and to provide for the regulation of railroad traffic within the State, just as Congress had provided for the regulation of such traffic between the States. Obviously, the Legislature intended to keep within its own sphere. Such being our conclusion, we find it unneces-

sary to discuss the question whether the provision of the statute under which this suit is brought would be constitutional if intended to apply to interstate shipments."

G. C. & S. F. R'y Co. vs. Fort Grain Company (Texas Civil Appeals, 3d District), 72 S. W. R., 419. This suit was by the Grain Company for overcharges and penalties under the Texas statute for charging more on shipments from Texarkana, Texas, to Copperas Cove and San Angelo, Texas, than the rate prescribed by the Commission. The general features of the case were substantially the same as here. The Fort Grain Company, doing business at Waco, Texas, contracted to sell grain at Copperas Cove and San Angelo, and to fill their contract purchased grain from a firm in St. Louis, Mo., to be shipped to Texarkana.

The bills of lading were made out to Texarkana, Arkansas, but it was claimed by the Grain Company that the delivery was in fact made in Texarkana, Texas, where new bills of lading were issued to go to Copperas Cove and San Angelo. From a verdict and judgment in the trial court the railway company appealed. We quote from the Court's opinion:

"The trial court instructed the jury as follows: 'By "interstate shipment" is meant freight that is shipped from one State through and into another on a bill of lading issued by the initial carrier to be carried through from the terminal point to the point of destination; and if you find that the bill of lading was issued to Conner Bros., and it was the intention of the parties that this shipment of freight was to be delivered at Copperas Cove and San Angelo, Texas, then it would be an interstate shipment under the law, and you will find as instructed above.' This charge is complained of in appellant's ninth assignment of error. This definition of an interstate shipment is not accurate. The shipment may be interstate, although transported by virtue of numerous bills of lading. The original bill of lading upon which the goods were shipped mentioned Texarkana, Ark., as the terminal point. There is evidence to the effect that the

goods were delivered at Texarkana, Texas, and were there re-billed, and a new bill of lading issued, upon which the property was finally transported to its destination. If the purpose and intention was, when the goods were shipped from St. Louis, that their final destination was Copperas Cove and San Angelo, it would be an interstate shipment, notwithstanding the transportation was not upon a through bill of lading. Houston Navigation Co. vs. Ins. Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17. The twelfth assignment of error complains of the following charge: 'You are charged if you believe from the evidence that the Fort Grain Company only acquired title to the several shipments of corn shown in the evidence, after the same arrived at Texarkana, Texas, that they did not own said corn at any point outside the State of Texas, then the shipment made by it from Texarkana, Texas, to any point in the State of Texas would be such a shipment as would be subject to the rates fixed by the Railway Commission of Texas. And if you believe from the evidence that the defendant charged and collected, demanded or received, from plaintiffs, as freight charges, any greater rate charge or compensation than that fixed and established by the Railway Commission for the transportation of such freight, then you will find for plaintiffs, as damages, the amount of such overcharge, if any.' This charge was erroneous. Acquiring title to the shipments of corn after their arrival at Texarkana was not the sole test by which to determine whether the shipments were or not interstate. If, when the corn was started, or before it reached Texarkana, it was the purpose and intention that the corn in question should be transported to its final destination—that is, Copperas Cove and San Angelo—the transportation would be interstate, and not domestic, although the plaintiff may not have acquired title until after the corn reached Texarkana, Texas."

A short opinion on the motion for re-hearing appears in 73 S. W. R. 845, which does not modify the Court's opinion on the points above indicated. As the judgment was reversed by the Court of Civil Appeals, the Supreme Court did not have jurisdiction to grant a writ of error. Your Honors will observe that as a rule the Texas courts have been correct in their interpreta-

tion of interstate commerce. It must be admitted that the ruling of the Court of Civil Appeals for the second district, and of the Supreme Court in this case conflicts with the decisions of the Court of Civil Appeals for the third district in Railway vs. Fort Grain Company, and in State vs. Southern Kansas R'y Co. In this case the Court of Appeals base their opinion principally upon Brown vs. Houston, 114 U. S. 622, while the Supreme Court lodge their decision on Welton vs. Missouri, 91 U. S. 275; Leisy vs. Hardin, 135 U. S. 100; Earnest vs. Missouri, 156 U. S. 296; Waring vs. The Mayor, 8 Wall. 110, and Pervear vs. Commonwealth, 5 Wall. 475. Except Leisy vs. Hardin, the above cases all involved questions of taxation, and as before intimated, property may, under some circumstances, be subject to State taxation and still remain interstate commerce. In support of this statement, we refer to the opinion of the Court by Mr. Justice White in American Steel & Wire Co. vs. Speed, 192 U. S. 500.

"This is as conclusively foreclosed by the decisions of this Court as is the doctrine resting upon the decision in Brown vs. Maryland; Woodruff vs. Parham, 8 Wall. 123, 19 L. ed. 282; Brown vs. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. The doctrine upon which the cases rest was this—that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one State to another. The several States, therefore not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the State.

Those two cases decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power

exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this Court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was re-stated: Emert vs. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; Kelley vs. Rhodes, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been, by inevitable implication, overruled by the cases of Leisy vs. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Lyng vs. Michigan 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, and other cases resting on the rule expounded in those cases.

We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that, in Leisy vs. Hardin and Lyng vs. Michigan, and most of the similar cases relied on, the decisions in Woodruff vs. Parham and Brown vs. Houston were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. Brown vs. Maryland illustrates the first of these cases, while Woodruff vs. Parham, Brown vs. Houston, Leisy vs. Hardin, Lyng vs. Michigan are examples of the other. Thus, in Brown vs. Maryland there was an absolute want of power to tax imports, and it was held that a State enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. Woodruff vs. Parham and Brown vs. Houston, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a State so operated upon inter-

state commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the Criterion announced in Brown vs. Maryland—that is, sale in the original packages at the point of destination—was applied. *The Court therefore conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however they had arrived at their destination, were at rest in the State,* were enjoying the protection which the laws of the State afforded, and were taxed without discrimination, like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In Leisy vs. Hardin and Lyng vs. Michigan the same question in a different aspect was presented. The goods had reached their destination and the question was not *the power of the State to tax them, but its authority to treat the goods as not the subjects of interstate commerce,* and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at the different period for the purposes of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale *at the point of destination* in the original packages, were rested upon the nature and operation of the particular exertion of State authority considered in the respective cases."

The idea involved is that the federal Constitution absolutely prohibits a State from taxing imports while there is no prohibition *per se* of a State from taxing interstate commerce, and hence the latter only is forbidden when it in fact amounts to a regulation of interstate commerce so as to come within the perview of the commerce clause. Hence a State may tax intestate commerce unless such taxation amounts to a restraint upon or impediment thereto and in that sense regulates the same. Where property has arrived in a State from another

State and is held indefinitely for sale at some future and contingent time, the taxation of the same on terms of equality with other property in the State will not amount to a regulation of interstate commerce. On the other hand if the State undertakes to levy a discriminating tax against such property in favor of property produced or manufactured in the State, the same would be a regulation of interstate commerce. Of the first class are such cases as Emert vs. Missouri, 156 U. S. 296; Woodruff vs. Parham, 8 Wall. 123; Hynson vs. Lott, 8 Wall. 148; Brown vs. Houston, 114, 622; while of the other class are Ward vs. Maryland, 12 Wall. 418; Welton vs. Missouri, 91 U. S. 275; Cook vs. Pennsylvania 97 U. S. 566; Webber vs. Virginia, 103 U. S. 344; Walling vs. Michigan, 116 U. S. 446.

In Waring vs. the Mayor, 8 Wall., 110, Waring made contracts for the purchase of salt from the charterers or owners of vessels for delivery to him on lighters in the port of Mobile, it being stipulated that the risk was not to be on him until the salt was placed on the lighters, and deliveries of salt were not made on his lighters until after the entry of the cargoes in the custom house. The Court held that Waring was not the importer of the salt and that his business of selling salt in the city of Mobile might be taxed. The decision was based solely on the provision of the federal Constitution prohibiting taxation by the States of imports. The Court did not hold that the salt when loaded on the lighters ceased to be controlled by the commerce clause of the federal Constitution. To the contrary it is plain from subsequent decisions of this Court that had the State levied a discriminating tax against the sale of salt by Waring in favor of salt produced in the United States, that the Court would have held that the salt in his store in Mobile remained subject to the commerce clause, and that such discriminating tax was a regulation of foreign commerce within the meaning thereof. Walling vs. Michigan, 116 U. S., 446, and other cases above cited. Brimmer vs. Rebman, 138 U. S., 82, and cases there cited.

It is, however, doubted whether what occurred at Texarkana would subject the property to taxation in the State. Suppose that it had happened at Texarkana, Arkansas, instead of Texarkana, Texas. Then in pursuance of a contract of sale made in the State of Missouri before the car started from the State of Missouri and under an arrangement between the seller and the vendee made immediately upon the starting of the car from Missouri and several days before it arrived at Texarkana, Arkansas, that new bill of lading was to be taken out from Texarkana, Arkansas, and the car immediately shipped to Goldthwaite, Texas, all that occurred at Texarkana, Arkansas, was exchange of such bill of lading and the technical passage of the title at Texarkana, Arkansas, from the vendor to the vendee, both of whom were in Missouri, it having been the intention of the parties as soon as the car left Missouri and long before its arrival in Arkansas that such technical change of title would occur at Texarkana, Arkansas, and the car immediately shipped on to Goldthwaite, Texas. Would these facts have rendered the corn subject to taxation by the State of Arkansas? We think not, because from the beginning it was not the purpose of the parties that this corn should be identified in any way with the mass of property in the State of Arkansas, but that it should go through the State of Arkansas and be identified only with property in general on its arrival at Goldthwaite, Texas. There is an analogy between a case so stated and Norfork & Western Railway Co. vs. Simms, 191 U. S., 441, where the court, in an opinion by Mr. Justice Brown, said:

"Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have

passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina *is too slender a thread* upon which to hang an exemption of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

Here the sale of the corn by the Harroun Commission Company to the Hardin Company was made in Kansas City, Mo.; the money was paid there and as a part of the terms of the sale it was agreed that while the Harroun Company would ship the car of corn to Texarkana, that upon arrival there its agent would have bill of lading which had been made out by the Hardin Company in Kansas City, Mo., immediately upon departure of the car from that place and before its arrival in Texas, exchanged for the bill of lading issued at Kansas City and the corn without breaking the bulk or even having the seals of the car disturbed and without becoming in any manner identified with the property in general at Texarkana, was to be immediately shipped on to Goldthwaite, Texas to fill a contract of sale that had been made by the Hardin, Company to Saylor & Burnett of Goldthwaite prior to the shipment of the corn from Kansas City. Nor is this case within the ruling in Brown vs. Houston, 114 U. S., 622. There the coal had been transported from Pennsylvania to New Orleans and was held in New Orleans for sale indefinitely whenever an opportunity might occur. The Court said:

"The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, *without reference to the destination or use which the purchasers might wish to make of it*, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar."

"It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed *whilst it was in a state of transit* through that State to some other place of destination."

"With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for *the purpose of remaining there till used or sold*, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State, that being their place of destination for use or trade, if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

If there the coal had been sold by one citizen of Pennsylvania to another citizen of Pennsylvania under an arrangement by which only the title was to technically pass from one to the other on arrival at New Orleans, and under an arrangement by which as soon as the coal arrived at New Orleans bills of lading were to be substituted and the coal immediately shipped to Shreveport, the case would have had some parallel with this case and we believe that the Court would have decided that the coal did not become identified with the mass of property in New Orleans but was in transit and interstate commerce until arrival at Shreveport.

For the same reason we do not think that Fuqua vs. Brewing Company, 90 Texas, 298, decided by the Texas Supreme Court, sustains the conclusion of that Court in this case, for there Amarillo was the place of final destination in the State of the shipment. If, in the Fuqua case the arrangement had been that

the car would be stopped only at the State line in pursuance of a prior sale to Kingsbury with a technical transfer of title under the sale and immediate reshipment to Amarillo, there would have been some parallel with the present case.

Here the corn never ceased to be in transit. It was in the possession of one or the other of the railroad companies all the while after leaving Kansas City. Nothing was done except to transfer it from one railroad to the other in Texarkana withuot even breaking the seals of the car just as through freight is ordinarily transferred. The only incident that can be said to be out of the common run was that bills of lading were exchanged at Texarkana. As suggested in Norfork & Western Railway Co. vs. Simms, this is too slender a thread upon which to base an amalgamation of this corn with the property of the people of Texarkana.

Leisy vs. Hardin is the remaining case relied on by the Texas courts. We think this case had reference to a sale at the place of final destination in the State, of the property in original packages, and that the Court did not have in mind the mere technical change of title at the border line of the State under a trade between two citizens of the State of origin by the terms of which the goods were to be immediately shipped on from the station on the border to the place of final destination in the State, which place of final destination had been definitely fixed and determined by all parties in interest before the goods left the State of their origin. This statement is supported by Rhodes vs. State of Iowa, 170 U. S., 412. There it was held that the statute of Iowa making it an offense for a carrier to convey from place to place within the State intoxicating liquors, could not under the commerce clause of the federal Constitution be applied to the carriage of a shipment from the State line of Iowa to the place of final destination in Iowa, and this notwithstanding the Act of Congress of August 8, 1890, providing that intoxicating liquors trans-

ported into a State and remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State be subject to the operation of its laws, etc. After commenting upon Bowman vs. Railway Co., 125 U. S., 465, the Court said:

"The fundamental right which the decision in the Bowman case held to be protected from the operation of State laws by the Constitution of the United States was the continuity of shipment of goods coming from one State into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. This protection of the Constitution of the United States is plainly denied by the statute now under review, as its provisions are interpreted by the court below. The power which it was held in the Bowman case the State did not possess was that of stopping interstate shipments at the State line by breaking their continuity, and intercepting their course from the point of origin to the point of consummation. The right of a State to exert these very powers is plainly upheld by the decision rendered below. It follows, that if the ruling in the Bowman case is applicable to the question here presented, it is decisive of this controversy, and must lead to a reversal of the judgment below rendered."

The dissenting opinion of Mr. Justice Gray, concurred in by Mr. Justice Harlan and Mr. Justice Brown does not question the proposition of the Court as generally applied to interstate commerce, but as we understand it, is based largely on consideration of the police power of the State to suppress injurious traffic and upon the construction of the Act of Congress referred to. However, in order to clearly present what was decided by the Court, we quote the concluding paragraph of the opinion of Mr. Justice Gray:

"The intoxicating liquor in question was brought by rail under a through way bill from Dallas, in the State of Illinois, to Burlington and Brighton, in the State of Iowa. It was carried by the Chicago, Burlington & Quincy Railway Company (whose road ran from Illinois into Iowa) to Burlington, and was there delivered to the Burlington & Western Railway (whose road was wholly in the

State of Iowa) and was carried by this Company to Brighton, and was there delivered by its servants upon the platform of its freight station. Taking into consideration that so much of the transportation as was performed by an interstate railroad company had been accomplished, and that the remainder of the transportation was by an Iowa corporation, and wholly within the State of Iowa, and had been so far completed as to land the intoxicating liquor upon the soil of Iowa, we are of opinion that there had been an "arrival in such State," so as to subject the liquor to the exercise of the police powers of the State of Iowa, within the letter and the spirit of the Act of Congress."

In American Express Co. vs. Iowa, 196 U. S., 133, it was decided that intoxicating liquors shipped C.O. D. from one State into another could not be subjected to seizure while in the latter State and while in the hands of the express company without infringing the Commerce clause of the federal Constitution. In the opinion of the Court by Mr. Justice White, from which there was but one dissent, it was said:

"The controlling of the two cases last reviewed upon this becomes doubly manifest when it is borne in mind that the power of the States to levy general and undiscriminating taxes on merchandise shipped from one State into another may attach to such merchandise before sale in the original package when the merchandise has become at rest within the State, and therefore enjoys the protection of its laws, and this upon the well recognized distinction that the movement of merchandise from State to State, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution. American Steel & Wire Co. vs. Speed, 192 U. S., 500, 48 L. Ed., 538; 24 Sup. Ct. Rep., 365."

Suppose, as is often the case, the combination of the local rates Kansas City to Texarkana and from Texarkana to Goldthwaite, Texas, had been higher than the through rate and the Hardin Company having contracted to sell the car of corn to Saylor & Burnett delivered at Goldthwaite, Texas, had purchased the corn

in Kansas City, Mo., from the Harroun Commission Company and it being inconvenient at the moment for the Hardin Company to pay for the corn and as testified, sales of corn being cash transactions, it had been arranged that the Harroun Commission Company would take out a bill of lading to Texarkana and by the time of the arrival of the corn there, the Hardin Company would pay the Harroun Company for the corn in Kansas City and that an agent of the Harroun Company at Texarkana would immediately exchange a blank bill of lading that had been prepared and sent from Kansas City for a Texas & Pacific bill of lading from Texarkana to Goldthwaite, and suppose further that such blank bill of lading indicating that the car was to go to Goldthwaite had been prepared for execution before the car arrived in Texas, and further, that the Hardin Company, before the car left Kansas City or at the time it left there, or on the date it left there, had mailed to Saylor & Burnett at Goldthwaite, Texas, an invoice showing the quantity and grade of the corn and the number of the car and initials of the car, thereby plainly fixing Goldthwaite, Texas, as the place of final destination long before the corn arrived in Texas, and suppose under such circumstances the carriers between Texarkana and Goldthwaite had sought to apply a higher local rate, is there any doubt that your Honors would hold that the transaction was one of interstate commerce, and that the technical change of title at Texarkana was too slender a thread upon which to base a contention of intrastate commerce? Now it may be that on a case thus stated you might hold that the shipper waived the right to the benefit of the through rate by taking out a bill of lading to Texarkana. That, however, is a different question. However, in this case, nothing was done by the plaintiff in error to indicate the slightest purpose to waive the benefit of the lawfully established interstate rates or of the right to have this shipment treated as controlled by the federal Constitution and the Acts of Congress.

We think the Supreme Court of the State in determining this case on the theory of a change of title at Texarkana overlooked the fact that a change of title may often occur without changing the nature of the thing which is the subject of such change of title. A man may sell to another the title to a house or a cow, but the house or the cow will still remain a house or a cow. So title to property on a vessel in midocean may pass by sale and delivery of the bill of lading, but the property notwithstanding remains interstate or foreign commerce until arrival at destination. Here the destination being fixed at Goldthwaite before the shipment left Kansas City, we submit that the change of title if it occurred at Texarkana had no more effect than would the change of title to property on ship board in course of a voyage to a foreign port. Suppose instead of the form in which this transaction occurred, the Harroun Commission Company had taken out a bill of lading to its order for the property consigned to Goldthwaite, Texas, and while the car containing the corn was actually moving across the State of Arkansas had endorsed and transferred the bill of lading to the Hardin Company and collected the price of the corn; would this have made the corn domestic commerce of the State of Arkansas or subjected it to taxation by the State of Arkansas?

We recur to the proposition that the power to tax does not alone determine whether the transaction is one of interstate commerce as intimated in the opinion of Mr. Justice Holmes in Henley vs. Kansas City Southern Railway Co., 187 U. S., 617, quoted *infra*. The decisions of the courts have been more liberal in sustaining the authority of the State to tax than in cases where the attempted regulation of the State applies directly to interstate shipments such as in this case regulating the amount of the charge to be made by the carrier.

Respectfully submitted,

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